IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DOUBLEDAY SPORTS, INC.,
Petitioner,

v.

EASTERN MICROWAVE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF AMICUS CURIAE

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IN THE

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No. 82-

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MOTION OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Motion Picture Association of America, Inc. ("MPAA") respectfully moves the Court for leave to file the attached brief *amicus curiae* supporting the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. Counsel for the petitioners has consented to the filing of the attached brief. MPAA was unable to obtain consent from counsel for the respondents.

The interest of MPAA is set forth at pages 1 and 2 of the attached brief. In summary, MPAA represents companies engaged, either directly or indirectly, in the distribution of copyrighted program material to cable television systems and

local television stations for broadcast within discrete television markets. The decision of the court of appeals would permit commercial enterprises to sell to cable systems program packages consisting of television broadcast programming, including works owned by MPAA member companies, without the permission of or compensation to the owners of that programming. This decision is contrary to the explicit statutory policy that royalties should be paid to the creators of programs sold for profit by commercial enterprises, and will result in the loss of substantial royalty revenues to MPAA member companies.

The MPAA brief discusses the decision of the court of appeals from the point of view of producers and distributors of feature films and recorded television program material. This is an interest that the petitioner as a copyright owner of sporting events does not represent or fully discuss.

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BRIEF AMICUS CURIAE OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion Picture Association of America, Inc. ("MPAA") respectfully submits this brief *amicus curiae* in support of the Petition for a Writ of Certiorari.

INTEREST OF THE AMICUS

MPAA is a national trade association representing producers and distributors of theatrical feature films and television program material. It's members include:

Columbia Pictures Industries, Inc.

Embassy Communications

Metro-Goldwyn-Mayer Film Co.
Orion Pictures Corporation
Paramount Pictures Corporation
20th Century-Fox Film Corporation
United Artists Corporation
Universal Pictures
Walt Disney Productions
Warner Bros. Inc.

The MPAA member companies are engaged, either directly or indirectly, in the distribution of program material to cable systems. Substantial revenues are received by the MPAA companies for the cable distribution rights to their programs.

The MPAA member companies also license their programs to local television stations for broadcast within discrete television markets. Many of these programs are intercepted from the broadcast signals of WOR-TV and WCBS-TV by respondent Eastern Microwave, Inc. ("EMI") and distributed to cable systems via satellite. EMI receives substantial payments from cable systems for the programs it delivers, but EMI does not compensate program owners or obtain their permission to distribute their programs. Program owners are thereby doubly harmed. First, they do not receive any compensation from EMI for the programs sold by EMI to cable systems. Second, their ability to license these programs directly to broadcast stations and cable systems is significantly reduced.

Disposition of the instant case will vitally affect the interests of MPAA members and program onwers generally insofar as it establishes whether suppliers of broadcast program packages such as EMI must obtain the permission of the copyright owners whose works are marketed to cable systems and compensate those copyright owners from the substantial revenues received from the sale of their property.

ARGUMENT

The question presented in this case is whether program distributors like EMI which sell copyrighted broadcast programming to cable systems, are exempt from copyright liability pursuant to 17 U.S.C. §111(a)(3). This provision exempts from copyright liability the "secondary transmission" of "primary transmissions" by "passive carriers" which have "no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission," and whose activities "consist solely of providing wires, cables, or other communications channels for the use of others."

The district court held that EMI's activities do not fall within the "passive carrier" exemption. The court of appeals reversed.

The decision of the court of appeals is contrary to the statutory objectives and Congressional intent reflected in the 1976 General Revision of Copyright Law, P.L. 94-553, and fails to properly distinguish between "passive carriers" and the activities of EMI.

The 1976 General Revision of Copyright Law for the first time imposed copyright liability for the retransmission of broadcast programs by cable television systems. Cable systems were made liable because Congress concluded:

> that cable systems are *commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material* and that copyright royalties should be paid by cable operators to the creators of such programs. (emphasis added) H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976).

EMI is not a cable system. But it is, without doubt, a commercial enterprise whose basic retransmission operations are based on the carriage of copyrighted program material. EMI is paid by its subscribing cable systems for a program package consisting of copyrighted works. The decision of the

court of appeals that EMI is exempt from copyright liability is contrary to the explicit statutory policy that royalties should be paid to the creators of programs sold for profit by commercial enterprises.

The exemption contained in Section 111(a)(3) does not depart from this policy. Rather, it distinguishes carriers whose business consists of providing "communications channels" from other commercial enterprises whose business consists of providing copyrighted program material. Clearly, the activities of EMI fall within the latter category.

EMI provides a *program* service, not a carrier service. It is impossible to distinguish between the service offered by EMI and that offered by cable program distribution networks such as Nickelodeon, a made-for-cable children's channel. Both deliver a package of programs to cable systems which pay for that program package. The major difference between the two is that EMI acquires the programs it sells without authorization from or compensation to program owners, whereas other program distributors obtain their programming directly from program owners who authorize and are compensated for the use of their programs. However, from the standpoint of the cable system customer there is no difference whatsoever between the two services. Each provides a pre-selected package of programs delivered by satellite for which the cable systems pay a fee.

The definitional prerequisite for a communications system to be regarded as a common carrier is that "the system be such that *customers* transmit intelligence *of their own design and choosing.*[1] There is no possible rationale by which EMI can be considered a common carrier under this test.

The cable systems which are the customers of EMI have absolutely no freedom to choose or even influence the "intelligence" which they receive. The program package sold to cable systems was carefully chosen by EMI from available broadcast signals and the only choice the cable system has is whether or not to subscribe to the service that EMI offers.

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[1] *NARUC* v. *FCC*, 533 F. 2d 601, 618 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

The promotional material distributed by EMI shows that cable systems are offered a specific program package. There is no indication that cable systems have any choice as to what programs they receive, and in fact they have none. From the perspective of the cable system customer, there is not a scintilla of difference between the choice offered by EMI and that offered by non-broadcast program distributors like USA Cable Network, Entertainment and Sports Program Network (ESPN), and Nickelodeon. In each case the only choice involved is whether to subscribe to the program package that is offered. Cable systems are *never* given an opportunity to use these services to receive programs of "their own design and choosing."

Finally EMI has no quasi-public characteristics and does not exert monopoly control over an essential facility or service. These are basic common carrier traits which EMI clearly does not possess.

In sum, Congress has determined that copyright owners should be paid when their works are included in secondary transmissions by commercial enterprises. In the case of cable systems, payment is governed by the terms of a compulsory license. In the case of other commercial enterprises, such as EMI, payment is to be determined in the open marketplace. The decision of the court of appeals would permit EMI to profit from the retransmission of copyrighted program material without compensation to program owners. This is clearly contrary to the policies embodied in the Copyright Act as well as the express language of Section 111(a)(3).

CONCLUSION

For the foregoing reasons, MPAA respectfully urges the Court to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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